Office Supreme Court, U.S.
FILED
MAR 6 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 896

FRANK PATZKE, JR.,
Petitioner,
vs.
THE CHESAPEAKE & OHIO RAILWAY CO.,
a Virginia Corporation,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

(Figures in parentheses refer to pages of the joint and supplemental appendices used in the court below, nine copies of which are filed herewith. Unless otherwise indicated italics are supplied.)

Frank Patzke, Jr., your petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court for the State of Michigan entered in the above cause on December 3, 1962.

OPINIONS BELOW

The opinion of the Circuit Court for the County of St. Clair, Michigan, is printed as Appendix A, *infra*, and is unreported.

The opinion of the Supreme Court for the State of Michigan is printed as Appendix B, *infra*, and is reported at 368 Mich 190.

JURISDICTION

The judgment of the Supreme Court for the State of Michigan, granting respondent railroad a new trial was dated and entered on December 3, 1962 (Appendix D, *infra*).

The jurisdiction of this court is invoked under 28 USC §1257 (3).

QUESTIONS PRESENTED

I

Does the defendant, in an FELA case who pleads, as an affirmative defense, introduces as a defense exhibit, and relies upon an injured employee's release as a "good and *valid* bar" to plaintiff's case, have the burden of establishing the validity of such release?

II

Can a FELA defendant first object to a jury instruction after verdict and discharge of the jury?

III

Was the release void as a matter of law?

IV

Did the setting aside of the verdict and judgment because the trial judge disagreed with the jury's determinations of fact constitute a violation of the Seventh Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision and statutes involved in this case are found in Appendix E. They are:

The Seventh Amendment to the Constitution of the United States.

45 USC §11
45 USC §51
45 USC §55
45 USC §56

A. The basic facts.

In April, 1957, a jury in the Circuit Court for the County of St. Clair, Michigan, awarded damages to the petitioner in this action under the Federal Employers Liability Act for personal injuries resulting from a defective hand brake on respondent's lines (45 USC §§11 and 51 *et seq.*). In July, 1957, respondent's motions for a directed verdict and judgment notwithstanding the verdict were denied and a judgment for petitioner was entered upon the verdict of the jury. In June, 1958, the Circuit Court set aside the

verdict and judgment and granted a new trial upon the presently relevant ground that the court had erred in instructing the jury that respondent had the burden of establishing the validity of the release pleaded by way of affirmative defense as a good and *valid* bar to plaintiff's action. Many other grounds of error were urged by respondent for setting aside the verdict and judgment. The Circuit Court set aside the verdict and judgment and granted a new trial for all of the grounds so urged plus its finding that the verdict of the jury resulted in a miscarriage of justice. The Supreme Court of Michigan affirmed upon the sole ground that the Circuit Court erred in instructing the jury that the burden of establishing validity of the release was upon the respondent.

Respondent first made objection to the jury instruction in question in June, 1957, approximately six weeks after the jury had been discharged (1sb).

Throughout the trial the circuit judge repeatedly commented upon the fact that either petitioner's witnesses or respondent's witnesses were committing perjury and stated that he was going to do something about it at the conclusion of the case. Most such comments were made in the absence of the jury; however, the court did call the perjury to the jury's attention during instructions. After the trial the Circuit Court stated in substance that there was no question of fact in the case except as "manufactured" by perjury, and said that he wanted to have affidavits filed as to the truth and proceed from that basis (possibly toward a perjury prosecution).

Petitioner contends that the real reason for setting aside the verdict and judgment was that the circuit judge disbelieved petitioner's witnesses and believed respondent's witnesses.

After its opinion and judgment of December 3, 1962, the Michigan Supreme Court stayed further proceedings pending filing of this petition.

The question (Question I) whether respondent had the burden of establishing the validity of the release was first raised on June 10, 1957, at a hearing on other motions, when respondent's counsel objected to petitioner's requested jury instruction on the subject. The question was later raised by respondent's motion for new trial. The trial court took no action on June 10, 1957, but granted the motion for new trial on June 2, 1958, upon this and other grounds. The Michigan Supreme Court upheld the action of the trial court on this ground alone.

Question II was raised and decided in the trial and in the appellate court as stated in the previous paragraph.

Question III (invalidity of release as a matter of law) was first raised when petitioner presented his proposed jury instruction on the subject. The trial court refused to grant such instruction. The question was again raised by petitioner in his brief in the Michigan Supreme Court. The Michigan Supreme Court ruled against petitioner on this question by affirming the granting of a new trial.

Question IV arose after the trial when the trial court granted respondent's motion for a new trial. It was briefed and argued in the trial court, and also in the State Supreme Court. In both courts it was decided against petitioner.

BASIS OF FEDERAL JURISDICTION

Provision is made in 45 USC 56 that the jurisdiction of the Courts of the United States shall be concurrent with that of the courts of the several states over actions brought

under the Federal Employers' Liability Act. Jurisdiction of the Circuit Court for St. Clair County, Michigan, was originally invoked under 45 USC §§11, 51 and 56:

REASONS FOR GRANTING THE WRIT

A. The Michigan Supreme Court has decided an important federal question which has not been determined by this court. This is, that despite the fact that the release was pleaded by respondent as an affirmative defense and was alleged to be a "good and *valid*" release of all of petitioner's claims, and was introduced in evidence by defendant, nevertheless petitioner had the burden of establishing that the release was *invalid*.

B. The Michigan Supreme Court has decided federal questions of substance in a way probably not in accord with applicable decisions of this Court. These are (Question II) that respondent's objection to the jury instruction on burden of establishing invalidity of the release was sufficient although not made until six weeks after verdict and discharge of the jury; that the release was not void as a matter of law although the consideration for it was 75% of petitioner's lost wages; and that the setting aside of the verdict and judgment was proper although based on the trial court's disbelief of petitioner's witnesses.

ARGUMENT

A. In this case plaintiff declared against the defendant railroad under the Federal Safety Appliance Act (45 USC §11) and the Federal Employers' Liability Act (45 USC §51, *et seq.*) claiming that defendant negligently failed to provide plaintiff with a safe place in which to work and failed to provide him with a safe appliance to operate. In its answer to plaintiff's declaration, the defendant included an affirmative defense, prefacing such defense with:

> "In addtion to the denials and defenses set forth above, (defendant will) give in evidence and insist in its defense as follows."

Paragraph one of the affirmative defense reads as follows:

> "That plaintiff herein has executed a good and *valid* release of any claims he has or may have arising out of the accident which plaintiff alleges herein, a copy of said release being attached hereto and which is hereby made a part hereof, and that said release is a good and valid bar to any recovery in this action."

The burden of proving the release valid was on the defendant which introduced the issue of validity of the release into the case first by pleading and subsequently by the use of said release at trial as its exhibit 3. At trial below plaintiff's counsel requested, and the trial court granted, instruction that the defendant had the burden of proving the validity of the release according to its affirmatively pleaded contentions regarding it. No issue was made of this request (defendant not having made request for a contrary instruction) until weeks after the jury had rendered its verdict and had been discharged.

The Michigan Supreme Court held the trial judge was in error in granting this request to charge on grounds that are not too clear. First off, the Michigan Supreme Court discusses Michigan law on this point and then proceeds to acknowledge that federal law applies—further stating that federal law in regard to validity of releases under the Federal Employers' Liability Act "is similar to our State law." *Callen v. Pennsylvania Railroad Co.*, 332 US 625, 92 L ed 242, is cited in the opinion below as is *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 US 359, 96 L ed 398, for the proposition that one who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity.

It is submitted that neither the *Callen* nor the *Dice Case* is controlling on this point.

The question who had the burden of establishing the validity of a release was not an issue in either of these cases. The only reference to burden of proof in the *Dice Case* is found in the dissenting opinion in which four Justices quoted the "burden of showing" language which was dictum in the *Callen Case*. In *Callen*, plaintiff's attorney and *amicus* counsel requested this Court to hold the burden of proving the validity of a release was upon the defendant. This Court refused to do so, stating that railroad releases stood on the same basis as any other releases and that one who attacked them had the burden of showing invalidity. Unfortunately the converse of this rule was not stated, i. e., that one who alleges a valid release as a bar to the plaintiff's case—as an affirmative defense—has the burden of establishing its validity. Railroad counsel in *Callen* considered the "burden of showing" argument irrelevant as appears in its brief in opposition to certiorari filed October 1, 1947, on pages 10 and 11 thereof. Both federal and Michigan court rules require that a release be pleaded as

an affirmative defense (Federal Rules of Civil Procedure 8(c) and old Michigan Court Rule 23, 3). Federal and Michigan practice impose upon the pleader of an affirmative defense the burden of proving such.

The validity of a railroad release is to be decided by the federal common law gathered from the same sources which, before *Erie R. R. Co. v. Tompkins*, 304 US 64, federal courts employed in cases depending upon diversity of citizenship. *Ricketts v. Pennsylvania R. Co.*, 153 F. 2d 757.

That common law was, in substance, that the burden of proving affirmative defenses was on the defendant. For example, in *Wright-Blodgett Co. v. United States*, 236 US 397, a suit brought by the United States to cancel certain land patents, the United States supreme court ruled that *bona fide purchase for value* was an affirmative defense which the defendant was required to establish in order to defeat the government's right to the cancellation (236 US 403). In *Central Vermont R. R. v. White*, 238 US 507, an FELA case, this Court ruled that the question of who had the burden of proving contributory negligence was a matter of substantive right rather than a mere matter of state procedure. In substance this court held that despite the state requirement that plaintiff establish freedom from contributory negligence, the federal common law rule which made contributory negligence an affirmative defense and placed the burden of proving it upon the defendant was to be applied (238 US 512). Other federal cases holding that the burden of proving affirmative defenses is on the defendant include *Rinehart & Dennis Co. v. Childree & Taylor*, 257 F 37, 40 (payment and set off); *Howe v. General Motors Corp.*, 167 FS 330, 336 (laches and estoppel); *Ocean A & G Corp. v. Reubin*, 273 F 2d 157 (exception in

insurance policy); *Gipps Brewing Co. v. Central M. M. Ins. Co.*, 147 F 2d 6 (fraud); *State Farm M. A. Ins. Co. v. Koval*, 146 F 2d 118 (insured's breach of cooperation clause); *National Lead Co. v. Nulsen*, 131 F 2d 51, certiorari denied 318 US 758, *(res judicata)*; *United States v. Goldberg*, 136 FS 34 (agency); *Whitaker & Co. v. City of Carbondale*, 55 FS 72 (invalidity of bonds). [Diversity cases such as *Palmer v. Hoffman*, 318 US 109, and *Cincinnati N. O. & T. P. Ry. Co., v. Eller*, 197 F 2d 642, certiorari denied 344 US 864, holding that the burden of proving an affirmative defense is determined by state law are not in point because they apply the rule of *Erie R. Co. v. Tompkins*, 305 US 64. See *Ricketts* (153 F. 2d 757).]

Some of the above cases were decided according to federal common law prior to the adoption of the present Rules of Civil Procedure, including rule 8 (c). Michigan's court rule 23, §3, requires the special pleading of releases and other affirmative defenses, and places the burden of proving such defenses on the defendant.*

For Michigan cases on this same point see *Residence Fire Ins. Co. v. Hannawald*, 377 Mich 103, 106 (arson); *Eherenbrook v. Webber*, 100 Mich 314, of which more later; *Clark v. Dillman*, 108 Mich 625, 627 (agency); *Moore v. Mutual Reserve Life Association*, 133 Mich 526, 534 (breach of warranty); *Truax v. Heartt*, 135 Mich 150 (recoupment); *Wallace v. Detroit, etc. Ry. Co.*, 176 Mich 128, 134 (loss of baggage by lightening); *Connor v. McRae*, 193 Mich 682, 693-695 (casual and involuntary trespass); *Meeuwsen v. Clough & Warren Co.*, 207 Mich 697, 700-701 (condition precedent to effectiveness of contract);

*This Court, as well as the State Courts, recognizes exceptions to the general rule. That these state and federal exceptions are identical will be shown later herein.

Hamburger v. Bank of Detroit, 218 Mich 173, 176 (acceptance of another as debtor); *Peck Iron and Steel Works v. Boomerschein*, 221 Mich 171, 175 (fraud); *Munroe v. Pere Marquette Ry. Co.*, 226 Mich 158, 160 (adverse possession); *Willard v. Shekell*, 236 Mich 197, 205 (election of remedies); *Fink v. Superior Lamp & Shade Co.*, 238 Mich 390, 395, (that certain accounts were house accounts upon which plaintiff was entitled to no commission); *Burke v. City of River Rouge*, 240 Mich 12, 14 (waiver); *Molnar v. Mutual Auto Insurance Co.*, 242 Mich 41, 42 (noncompliance with condition in insurance policy); *Dunn v. Citizens Mutual Fire Ins. Co.*, 251 Mich 71, 73 (arson); *Palmer v. Schrage*, 258 Mich 560, 568-569 (failure to give notice); *Shiovitz v. New York Life Ins. Co.*, 281 Mich 387 (suicide); *In re Dunneback's Estate*, 302 Mich 73, 77 (payment); *Hatch v. Township Unit School*, 310 Mich 516, 533; *Saari v. G. C. Dates & Associates*, 311 Mich 624, 628-629 (breach of contract); *Brown v. Sellars*, 312 Mich 313, 325 (satisfaction); *In re McKenes' Estate*, 315 Mich 369, 381 (statute of limitations); *Obrenski v. Dworzanin*, 322 Mich 285, 290 (cancellation or accord and satisfaction); *Malcolm MacDonell & Associates, Inc. v. Bank*, 325 Mich 591, 598, (justification for breach of contract); *Redding v. Snyder*, 352 Mich 241, 247-248 (estoppel and waiver). Respondent cited only one Michigan case which was in point and to the contrary. That was *Porth v. Cadillac Motor Car Co.*, 198 Mich 501, holding that the burden of establishing fraud in connection with a release was upon the plaintiff. This case is contrary to the great weight of Michigan authority and the holding of Michigan in *Cottrell v. United Traction Co.*, 184 Mich 221, wherein it was ruled that the burden was on the defendant to show that the release applied to the employment in which deceased was engaged at the time of his death.

As will be noted some of the above stated Michigan decisions ante-dated any court rule on the pleading of affirmative defenses or (in general issue days) special defenses.

The above stated state and federal holdings are in accord with the general rule as stated in *31 CJS* 714, Evidence §104:

> "The burden is on defendant to prove matter in avoidance, special or affirmative defenses, and other new matter pleaded by him as ground for denying the plaintiff relief."

To the Michigan and federal rule that the burden of establishing an affirmative defense is on the defendant there is the well-known exception that a party who would not otherwise have the burden of proof may acquire it by contentions made in the pleadings, claims orally stated during or prior to the trial as well as by the course of the trial itself. Thus in *American Ry. Express Co. v. Ready*, 232 Mich 624, plaintiff had pleaded *nonpayment* in a suit for the price of goods delivered. Defendant made a simple denial. *Payment* was an affirmative defense which was not pleaded. This court held in a 5 to 2 decision that the *plaintiff* had the burden of establishing *nonpayment*. In *Parker v. Baldwin*, 216 Mich 472, 477, Michigan also held that by the pleadings and the manner in which the case was tried plaintiff had assumed the burden of proving *nonpayment*, although payment was an affirmative defense normally to be pleaded and proved by defendant. In *Manglares v. Passiales*, 214 Mich 188, 190, the Michigan Supreme Court observed:

> "Undoubtedly, there are cases where by reason of the theory of the declaration or where the plaintiff *assumes* the burden of proving nonpayment, such a defense would be available to the defendant without specially pleading it."

Also see *Kahn v. Minthorn*, 178 Mich 312, 319-320. The same exception prevails in federal courts. That is, a party who does not otherwise have the burden of proof on a particular issue may acquire it by *assuming* it. See *Kentucky Vermillion M. & C. Co. v. Norwich etc.*, 146 F 695, 702-703; *Spokane Interstate Fair Assoc. v. Fidelity & Deposit Co.* 15 F 2d 48; *United States v. Patterson*, 34 F 2d 245, 249-250; *Remington-Rand Inc. v. United States*, 202 F 2d 276, 278. In the last mentioned case the court held on page 278 that the United States had assumed the burden of proof by virtue of the opening statement of its attorney. Having once *assumed* the burden of proving a particular issue of a case, the burden stays with the party who assumed it. It cannot be "*unassumed*." See *4 CJS* 743, Appeal & Error §241; *31 CJS* 713, Evidence §104; *3 CJ* 736, Appeal & Error §630; *22 CJ* 70, Evidence §14.

Having pleaded the release as an affirmative defense in *Callen*, under ordinary circumstances the burden of establishing the release would have been upon the defendant railroad. However, this burden or, rather, its converse, the burden of proving the *invalidity* of the release in that case was *assumed* by the plaintiff in this manner: The plaintiff introduced the release as a plaintiff's exhibit and then attempted to avoid it by attacking it on the ground of fraud. See pages 26a-28a and 267a of the *Callen* transcript of record. No such thing occurred in *Patzke*. In this case *validity of the release was pleaded as an affirmative defense* (13a-15a) which was denied by plaintiff's reply (17a). The release was introduced *by defendant* as a defense exhibit (251a, 864a), and plaintiff at no time assumed any burden with repect to proving the invalidity of the release as was done in *Callen*. Furthermore, instead of simply alleging that it had "a full and complete release" as was done in *Callen* (page 8a of *Callen* transcript of record), *the de-*

fendant itself in Patzke raised the issue of the validity of the release by affirmatively alleging that it had a "good and *valid*" release which was a "good and *valid* bar" to plaintiff's action (15a). It follows that under both state and federal law, and regardless of *Porth*, 198 Mich 501, the defendant in *this* case did have the burden of establishing the validity of the release, and the trial court's instruction on this point was not error.

B. After the jury was discharged on April 26, 1957 (809a), defendant filed "a motion for directed verdict" on May 1, 1958 (779a), plaintiff filed motions for judgment on the verdict and allowance of expert witness fees on May 9, 1957 (3a) and defendant filed a motion for judgment notwithstanding the verdict on May 16, 1957 (781a). At least three hearings before the trial court on these motions, *with all counsel present*, were held previous to June 10, 1957 (excerpts from two of these hearings are found on pages 810a and 813a). Yet, counsel made no objections to the trial court's jury instructions until June 10, 1957 (1sb), —6 weeks after the jury had been discharged.

Certainly they should not have been allowed to raise their objections weeks after the jury had gone home. This not only would result in gross injustice to the court, but it is not the law. Garton v. Union City National Bank, 34 Mich 279, 281.

Michigan has held that parties cannot remain silent and thereby lie in wait to ground error after the trial is over upon faulty jury instructions. *Kinney v. Folkerts*, 84 Mich 616, 625.[1]

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[1] But, see a recent contrary division of the Michigan Supreme Court upon the effect of an alleged failure to instruct. *Sakorraphos v. Eastman Stores*, 367 Mich. 96.

Rule 51 of the Federal Rules of Civil Procedure likewise provides that no party may assign error on the giving of an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

It is clear that under both the state as well as the federal law a railroad employee ought not be deprived of his verdict on account of an alleged erroneous jury instruction to which objection was not made until six weeks after the jury had gone home.

C. The release was void as a matter of law for a number of reasons. It was obtained from petitioner either by means of fraudulent representations or under a mutual mistake of fact. It was truly a "device" exempting respondent from liability (45 USC §55; *Dice v. Akron, C. & Y. R. Co.*, 342 US 359, 362). It was also given without sufficient consideration under the ruling of this court in *Maynard v. Durham & Southern R. Co.*, 365 US 160, because the consideration therefor was 75% of petitioners wages. See pages 202a, 203a, 252a, 253a, 292a, 439a, 440a, 442a, 460a, 461a, 462a, 488a, 700a and 763a of the joint appendix, nine copies of which have been filed with the clerk pursuant to §4 of Rule 21, Supreme Court Rules.

D. This court has held on several occasions that the trial judge cannot act as a "super jury" and set aside a jury verdict when he differs from it on the facts.

In this case the trial judge commented several times in the absence of the jury and in the presence of the jury during his instructions that perjury had been committed by some of the witnesses who testified. Some of these trial court comments were that there must be perjury and that the court was going to keep its own counsel as to what it

was going to do at the conclusion of the case; that the testimony was irreconcilable, that perjury had been committed and that attorneys were involved; that absolute disregard for Almighty God had been portrayed in the courtroom and that alone stood out in this case; that he was going to do something about it at the conclusion of the case; that someone or several individuals came into court and lied and that there was no reason for the court to give its official sanction to such conduct; that counsel seemed to feel the only thing required was jury determination and the court was in disagreement with this; that a question of fact was not created—that the "question of fact was manufactured by someone in this case,"; etc (575a-577a, 767a, 769a, 774a, 810a-837a).

Importance of a jury decision in FELA cases is illustrated by the opinion of this Court in *Schulz v. Pennsylvania R. Co.*, 350 US 523, 524, wherein it was stated:

> "*The jury trial 'is part and parcel of the remedy afforded railroad workers under the Employer's Liability Act'*, which the Jones Act makes applicable to those working as petitioner's husband was here. The Seventh Amendment to the Constitution provides that 'the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law'. We granted certiorari to consider the failure of the District Court to let this case go to the jury."

Similarly, in this case, certiorari should be granted to consider the failure of the trial judge to let the jury's verdict stand because he disagreed with its findings of fact and believed that plaintiff's witnesses had committed perjury.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

TRIAL COURT'S OPINION ON MOTION FOR NEW TRIAL

(Filed May 21, 1958)

Kane, J.:

The above-entitled matter was heard by the Court and jury. Since the verdict, the Court has had the benefit of arguments on the several motions previously filed by the counsel for the respective parties and has listened to the charges and counter-charges which have been made.

It appearing to the Court that for the reasons set forth in Defendant's Motion for a New Trial and because it is the Court's belief that a miscarriage of justice has resulted, a new trial is and the same is hereby ordered.

An order in keeping with this opinion may be presented by defense counsel.

/s/ Edward T. Kane,
Circuit Judge.

Dated: May 21, 1958.

APPENDIX B

OPINION OF THE SUPREME COURT OF THE STATE OF MICHIGAN

(Filed December 3, 1962)

Before the Entire Bench, except Black, J. and Souris, J.

KELLY, J.

This Federal employers' liability action resulted in a jury verdict of $118,000 for plaintiff. The trial court granted defendant's motion for new trial, stating:

> "It appearing to the court that for the reasons set forth in defendant's motion for a new trial and because it is the court's belief that a miscarriage of justice has resulted, a new trial is and the same is hereby ordered."

Plaintiff appeals, contending the trial judge abused his discretion in granting a new trial.

Plaintiff testified that he had been thrown off the top of a box car (December 3, 1955) by a defective hand brake.

Defendant introduced testimony that shortly after the fall plaintiff stated that while he was descending from the car his hold slipped and he fell to the ground. Approximately 6 weeks after the accident plaintiff gave defendant a written statement (January 17, 1956) in regard to the accident, which reads in part:

> "As this car was coming towards me, it was traveling along about 2 or 3 miles per hour and I

> got on in the usual manner on the south and west side of the car after which I climbed up the side ladder and stepped around the corner of the car into the end ladder after which I got up on the brake platform and when the car had run in the clear of the scale track I set the brake and stopped the car after which I started to climb down, at which time my right foot was resting on the brake platform, and my left foot was resting on one of the hand holds in the end ladder and with my left hand I was holding onto the roof grabiron or hand hold, and I let go of the brake wheel with my right hand and as I was reaching for the roof grabiron with it, my left hand slipped off of the roof grabiron or hand hold and I fell to the ground on the west side of the track landing on my feet and from there I fell on my back."

Plaintiff claims that the statement is false and that he falsified it because he was in dire need of money, and feeling the exigencies of fast mounting bills and the needs of his family, he sent for Mr. Wallace (defendant's claim agent); that before Mr. Wallace would talk of paying plaintiff any money at all he said he would have to have a statement as to how the accident happened. After he signed the statement, plaintiff was paid $500 by defendant.

Plaintiff signed a release of claim against defendant (February 27, 1956) and we quote the following from plaintiff's statement of facts and defendant's counter-statement, as set forth in the respective briefs submitted to this Court. Plaintiff states:

> "Plaintiff was told by the railroad doctors that he was in such condition of recovery that he would be able to return to work by March 15, 1956. On February 27, 1956, Mr. Wallace (defendant's claim agent) came to plaintiff's home to make a settlement of the claim. Mr. Wallace telephoned both of the railroad doctors and was told by each doctor that he was positive plaintiff would return to work

on March 15, 1956. Mr. Wallace communicated this information to plaintiff. Mr. Wallace then prepared a release of all liability to be signed by the plaintiff for the purpose of relieving the defendant of all liability for plaintiff's injuries. Plaintiff received another $600 which was to cover his loss of wages up to March 15, 1956 on a 75% basis.

"Before signing the release plaintiff asked Mr. Wallace what would be the situation if he were unable to return to work on March 15, 1956. Mr. Wallace said that in such case the release would be destroyed and plaintiff's case would be reopened. At the time he made this statement about destroying the release Mr. Wallace knew that he had no such authority and could not destroy the release or reopen plaintiff's case.

"On the strength of Mr. Wallace's promise to destroy the release and reopen his case and believing the truth of the railroad doctor's assertions as to his state of health, plaintiff signed the release and received $600 from Mr. Wallace. This release was used at trial by the railroad company to defend this case. On March 15, 1956, plaintiff was unable to return to work. Subsequently on 3 separate occasions he was paid the sum of $300 by Mr. Wallace on behalf of the railroad company. Each time he received a $300 check from defendant plaintiff was required to sign a receipt stating that the same was to be 'credited against settlement or judgment when made.' In July of 1956 Mr. Wallace offered plaintiff $148 as a 'final settlement' of plaintiff's claim. This was refused by plaintiff.

"When plaintiff subsequently consulted his own physician and learned the extent of his disability he requested that the release be destroyed and his claim reopened. The release was never torn up by defendant and plaintiff's case was never reopened."

Defendant says:

> "That it is railroad policy to pay injured employees a percentage of their wages regardless of fault on the part of the railroad; that the railroad always assumed any and all medical expenses and he advanced the various sums to plaintiff in accordance with this policy and because plaintiff was in need. Mr. Wallace obtained a release from plaintiff and it was after it was executed and delivered to Mr. Wallace that there was any conversation with respect to paying additional sums to plaintiff if he did not return to work; and any such promises made to plaintiff were carried out. Plaintiff never told him the brake threw him off the car or that there was anything wrong with it; he testified that the only promises to plaintiff were that if he could not return to work by March 15, 1956, he would see if he could get further consideration.
>
> "Plaintiff is capable of doing a clerk's job and was offered one by the defendant railroad but insisted that he be guaranteed a permanent job and that he would not lose his seniority as a switchman which is impossible for the railroad to guarantee because of the union contract."

The legislature provided (CL 1948, §650.28 [Stat Ann 1943 Rev §27.2618]) that the trial judge be empowered to grant a new trial if "in the opinion of the court, after an examination of the entire cause" the court should decide there has been "a miscarriage of justice."

In *Cooper v. Carr*, 161 Mich 405, this Court stated the trial court's decision would be upheld unless there was no justification or excuse for the ruling, stating (p 412):

> "We are aware of the rule that the granting of a new trial ordinarily rests in the discretion of the trial court, which, if not abused, cannot be interfered with by this Court. To warrant such interfer-

> ence, the abuse ought to be so plain that upon consideration of the facts upon which the trial judge acted, as unprejudiced person can say that there was no justification or excuse for the ruling made."

We recognized a greater latitude in granting than in refusing new trials in *Haskin-Morainville Paper Co. v. Bates Valve Bag Corp.*, 268 Mich 443, 450, by quoting with approval 4 C J, §2813, pp 831, 832:

> "'Even greater latitude is allowed the trial court in granting than in refusing new trials, and the appellate court will interfere more reluctantly where the new trial is granted than where it is denied, since in such cases the rights of the parties are not finally settled as they are where the new trial is refused."

The trial court charged the jury with respect to the burden of proof as to the validity of the release as follows:

> "Now, there has been considerable testimony concerning this instrument and I must charge you that the burden of proving by the preponderance of the evidence that this is a valid release and that the same is such, rests upon the defendant in this case rather than the plaintiff and that is the sole and only factor that must be established by the defendant by a preponderance of the evidence because if you will remember, when I read to you and talked to you about the preponderannce of the evidence, I was very careful at that time to mention to you that the matters that were alleged in the plaintiff's declaration and which proof in substance and sustaining the same have been offered, this matter of the validity of the release, the burden of proof of that by a preponderance of the evidence rests upon the defendant and not upon the plaintiff. In other words, the burden of proving that the instrument or release involved was invalid is not a responsibility of the plaintiff to prove."

That this instruction is contra to the decisions of this Court is evidenced by our decision in *Porth v. Cadillac Motor Car Co.*, 198 Mich 501.

Federal law in regard to validity of releases under the Federal employers' liability act is similar to our State law. The United States Supreme Court in *Callen v. Pennsylvania Railroad Co.*, 332 US 625, stated (p 630):

> "Until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted."

Dice v. Akron, Canton & Youngstown Railroad Co., 342 US 359, involved an action by a railroad fireman who was injured when the engine in which he was riding jumped the track. An action was brought in the Ohio state court under the Federal employes' liability act. The purported release, and the ruling by the Ohio supreme court holding that Ohio law and not Federal law governed, were commented upon by the supreme court of the United States as follows (pp 361, 362, 369):

> "We * * * hold that validity of releases under the Federal Employers' Liability Act raises a federal question to be determined by federal rather than state law. * * * Releases and other devices designed to liquidate or defeat injured employees' claims play an important part of the federal act's administration. * * * Their validity is but one of the many interrelated questions that must constantly be determined in these cases according to a uniform federal law. * * * One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity,

> either by fraud practiced upon him or by a mutual mistake under which both parties acted.'"

We agree with the appellee that: "The validity of the release is an issue which completely controls plaintiff's right of recovery and since the charge of the court in this case was diametrically opposed to the correct law in this respect, there was reversible error which alone justified the trial court in granting a new trial and justifies this Court in affirming the action of the lower court."

We affirm the order of the trial court and remand for new trial. Costs to appellee.

APPENDIX C

TRIAL COURT'S ORDER GRANTING MOTION FOR NEW TRIAL

(Filed June 2, 1958)

At a session of said Court continued and held at the courthouse in the City of Port Huron, county and state aforesaid, this 2nd day of June, 1958.

Present: Honorable Edward T. Kane, Circuit Judge.

In this cause, upon reading and filing defendant's motion for new trial and the affidavits in support thereof and in opposition thereto, after argument by counsel for the respective parties, and briefs having been filed by both parties which were duly considered by the court, and the court being fully advised in the premises:

It Is Therefore Ordered That said motion for new trial be and the same hereby is granted and a new trial allowed for the reasons as set forth in defendant's motion for new trial heretofore filed in this cause and because the verdict of the jury has resulted in a miscarriage of justice.

Edward T. Kane,
Circuit Judge.

APPENDIX D

JUDGMENT OF THE MICHIGAN SUPREME COURT

(Filed December 3, 1962)

We affirm the order of the trial court and remand for new trial. Costs to Appellee.

APPENDIX E

CONSTITUTIONAL PROVISIONS AND STATUTES

SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

45 USC §11

It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. Apr. 14, 1910, v. 160, §2, 36 Stat. 298.

45 USC §51

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or

by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier, in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; ~~Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.~~

45 USC §55

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. Apr. 22, 1908, c. 149, §5, 35 Stat. 66.

45 USC §56

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the resi-

dence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, §6, 35 Sat. 66; Apr. 5, 1910, c. 143, §1, 36 Stat. 291; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167; Aug. 1f, 1939, c. 685, §2, 53 Stat. 1404; June 25, 1948, c. 646, §18, 62 Stat. 989.